2013 IL App (2d) 120340-U
No. 2-12-0340
Order filed September 9, 2013

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 10-CF-1787
PERCY JONES,	)	Honorable Allen M. Anderson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Burke and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court properly denied defendant's motion to quash and suppress, as the court was entitled to credit the officer's testimony that he was able to see, though from a distance and at a late hour, that defendant was driving without wearing his seat belt, justifying the traffic stop; (2) defense counsel was not ineffective for failing to renew the motion after trial: although the officer's trial testimony was somewhat different from his testimony on the motion, there was not a reasonable probability that the court would have changed its ruling.

¶ 2 Defendant, Percy Jones, was charged with unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2010)) and unlawful possession of a controlled substance, with the intent to deliver (720 ILCS 570/401(d) (West 2010)). He moved to quash his arrest and suppress evidence.

The trial court denied the motion. After a jury trial, defendant was convicted of simple possession and acquitted of possession with the intent to deliver.[1] He did not renew his motion to quash and suppress or file a posttrial motion and was sentenced to 20 months' imprisonment. On appeal, defendant contends that (1) the trial court erred in denying his motion to quash and suppress; and (2) alternatively, his trial counsel was ineffective for failing to renew the motion or to raise the issue in a posttrial motion. We affirm.

¶ 3 At the hearing on his motion, defendant testified as follows. On the evening of July 17, 2010, he drove out of a parking lot at the Fox View Apartments in Carpentersville. He was the only person in his car, a Cadillac, and he was wearing his seat belt. It was "just like when it was starting to darken up outside, so it had to be around *** 7:30, 8:00-ish maybe." Just as defendant entered the street, a police officer (James Schuldt) pulled him over. Defendant asked Schuldt why he was being stopped. Schuldt "reached in before he said anything, he reach [*sic*] his hand in, unhook [*sic*] my seatbelt [*sic*], and asked me why weren't [*sic*] I wearing a seatbelt [*sic*]." Schuldt then told defendant to step out of the car. Defendant complied.

¶ 4 Defendant testified that Schuldt searched him but found nothing suspicious. Next, Schuldt looked into the car and removed a clear plastic bag from the driver's seat. Defendant stayed nearby. A second officer (Kevin Stankowicz) arrived. The officers eventually arrested defendant.

¶ 5 Schuldt testified as follows. Before the encounter with defendant, he had been sitting in his unmarked squad car, a Chevrolet Impala, in a parking lot at the Fox View Apartments. Schuldt did not recall the exact time, but it had been in "the evening hours," while it was "still light out." As

[1]Defendant was also charged with resisting a peace officer (720 ILCS 5/31-1(a-7) (West 2010)), but the State later dismissed the charge.

defendant drove his "[m]aroon or reddish" Cadillac south on Oxford Road, passing Schuldt, Schuldt saw that defendant was "not wearing his seat belt as he was driving southbound on Oxford Road." See 625 ILCS 5/12-603.1(a) (West 2010). Defendant was on the side of the car nearer to Schuldt. Asked how far from defendant's car he was when he saw the seat belt-law violation, Schuldt testified, "Approximately 30 to 45 feet. 30, 40 feet."

¶ 6 Schuldt testified that he followed defendant's car; the windows were down. Schuldt stopped defendant. He approached and saw that defendant was not wearing a seat belt. As he requested defendant's license and proof of insurance, Schuldt smelled the odor of burnt cannabis coming from inside the car. He ordered defendant out and searched him but found nothing suspicious. As Schuldt looked down, however, he saw the plastic bag, which contained a substance that he recognized as cocaine. Schuldt reached down to take the bag. Defendant took off running. Schuldt chased him and radioed for help. Eventually, he and Stankowicz caught, subdued, and arrested defendant.

¶ 7 In rebuttal, defendant testified that his Cadillac had been tan. He had not been smoking marijuana, and there had been no cannabis odor.

¶ 8 The trial court denied defendant's motion. Addressing whether the initial stop for the seat belt violation had been proper, the trial judge explained, "There are facts known that to a reasonable person that would believe [*sic*] that a traffic offense had taken place. I do not find incredible the distances and the observation regarding a seatbelt [*sic*]." The judge also credited Schuldt's testimony in general and concluded that the arrest had been supported by probable cause.

¶ 9 The cause proceeded to trial. As most of the evidence is not pertinent to this appeal, we note only the following. Schuldt testified. In several respects, his testimony added to, or differed from, what he had said at the suppression hearing. He stated that the initial encounter took place at about

10:30 p.m. and that he was about 20 to 25 feet away from defendant when he saw that defendant was not wearing a seat belt. The area was "very well lit" by streetlights, including one directly over defendant's car, and by outside lights from several apartment buildings. As defendant passed Schuldt, he was driving within the speed limit of 20 miles per hour. The examination continued:

"Q. And can you tell the folks what kind of a seat belt does [defendant's car] have?

* * *

A. Okay. I believe it to have a shoulder belt.

Q. Could you tell from where you were sitting and looking at the car if [defendant] had the belt across his waist?

A. Of course not, no.

Q. So it is your testimony that you didn't see the shoulder part, is that correct?

A. That is correct."

Defendant did not renew his motion to quash arrest and suppress evidence and did not object to Schuldt's testimony on any ground raised in the motion. Defendant did not testify at trial.

¶ 10 The jury convicted defendant of simple possession but acquitted him of possession with intent to deliver. He did not file a posttrial motion. The trial court sentenced him to 20 months' imprisonment. We allowed defendant to file a late notice of appeal.

¶ 11 On appeal, defendant argues first that the trial court erred in denying his motion to quash arrest and suppress evidence. Defendant limits his argument to the initial stop. He observes that, by testifying that he was doing nothing unusual at the time of the stop, he established a *prima facie* case for suppression. See *People v. Matous*, 381 Ill. App. 3d 918, 923 (2008). He then argues that the State did not rebut his *prima facie* case. Defendant does not dispute that, if properly credited,

Schuldt's testimony that he could tell that defendant was not wearing a seat belt as he drove by the officer's squad car established the reasonable suspicion needed for the traffic stop (see *People v. Hackett*, 2012 IL 111781, ¶ 20). He maintains, however, that Schuldt's testimony was inherently incredible. Defendant cites *People v. Coulson*, 13 Ill. 2d 290, 297 (1958), for the rule that, where testimony is contrary to the laws of nature, or universal human experience, a court of review is not bound to accept it. Thus, defendant contends, the trial court erred in denying his motion.

¶ 12 The State asserts that defendant has forfeited review of the ruling on his motion, as he failed to file a posttrial motion. In general, the failure to raise a claim of error via a posttrial motion forfeits appellate review of the claim. See *People v. Enoch*, 122 Ill. 2d 176, 186-88 (1988). There is some authority applying this rule to the denial of a motion to suppress. See *People v. Echols*, 282 Ill. App. 3d 185, 189-90 (1996). Other authority, however, noting that *Enoch* includes an exception for constitutional issues that have been properly raised at trial and may be raised via a postconviction petition (*Enoch*, 122 Ill. 2d at 190), holds that the forfeiture rule does not apply to the denial of a motion to suppress. See *People v. Miller*, 355 Ill. App. 3d 898, 900 (2005); *People v. Cox*, 295 Ill. App. 3d 666, 669-70 (1998). We need not decide which view is correct. Since defendant argues that his trial counsel's failure to file a posttrial motion raising the suppression issue was ineffective assistance, we are bound to reach the merits of the trial court's ruling anyway.

¶ 13 We accept the trial court's findings unless they are against the manifest weight of the evidence, but we consider *de novo* the ultimate question of whether suppression was proper. *People v. Dawn*, 2013 IL App (2d) 120025, ¶ 20. Here, we address a relatively narrow attack on the trial court's factual findings. Defendant contends that Schuldt's testimony was inherently incredible in one crucial respect. He asserts that "it simply stretches the bounds of credibility to believe a person

sitting in a car at the very least 20 feet away from another moving car, after sundown, would be able to see into the other car and tell whether someone in the other car had his lap belt secured." Defendant contends generally that, when Schuldt saw defendant's car, it was simply too dark out for him to see the alleged violation from so far away.

¶ 14 We must note first that defendant's brief contains two potentially misleading statements: one of law and one of fact. First, defendant states that, in deciding his claim of error, this court may consider evidence presented at trial as well as that offered at the suppression hearing. This is correct, but in a limited way. When, as here, the trial court denied the defendant's motion and the defendant did not renew the motion or ask the court to reconsider its ruling, the trial evidence may be used to affirm the ruling, but not to reverse it. *People v. Brooks*, 187 Ill. 2d 91, 127-28 (1999). (In fairness, defendant's argument appears to implicitly acknowledge this limitation.)

¶ 15 Second, in his reply brief, defendant asserts that Schuldt testified that he had seen that "no seat belt was engaged on the defendant's lap," and he contends that, to have made this observation, Schuldt must have been able to "see through defendant's car." We note that, at the hearing, Schuldt did not use the term "lap belt," but instead said, "seat belt." At trial, he clarified that the car had a "shoulder belt"—apparently a combined lap belt and shoulder harness. Thus, Schuldt's testimony need not be taken as referring specifically to defendant's lap; it could have been interpreted to refer to a shoulder harness or the upper part of a combined lap belt-shoulder harness. See 625 ILCS 5/1-182.6 (West 2010) ("seat safety belt" that law requires to be worn includes "[a] set of belts or a harness"). Further, as defendant concedes, Schuldt clarified at trial that he had been looking at the "the shoulder part" and not whether defendant had "had the belt across his waist." Thus, the trial court could have taken Schuldt's testimony to refer to his view of defendant's shoulder area.

¶ 16 We return to defendant's argument. He relies on the rule that a court of review must discredit testimony that is "contrary to the laws of nature, or universal human experience." *Coulson*, 13 Ill. 2d at 297. That rule is sound, but we conclude that it does not apply here. Given our discussion of Schuldt's testimony, we reject defendant's contention that Schuldt would have needed X-ray vision to see whether defendant was properly buckled up. All Schuldt would have needed to see was whether the "shoulder part" of the belt, which was near the driver's-side window and visible without obstruction, was properly engaged. Defendant maintains that even this act of perception was impossible because it was dark out and Schuldt was too far away. We disagree.

¶ 17 At the hearing, Schuldt testified that the car windows were open and that he was between 30 and 45 feet away from defendant when he observed the violation at about 7:30 p.m., while it was still light out. (Defendant's testimony differed only slightly.) At trial, Schuldt reduced the distance estimate to 20 to 25 feet and testified that it was about 10:30 p.m. but that the area was "very well lit." Whatever the inconsistencies in his testimony, we cannot say that Schuldt's account was so implausible that the trial court could not properly credit it.

¶ 18 Taking first the evidence at the suppression hearing (the only evidence that the trial court actually considered on the validity of the stop, as defendant did not renew his motion), we cannot say that it is contrary to the laws of nature or universal human experience. The evidence allowed the trial court to infer that, at the time of the stop, the sun had not set; that Schuldt had an unobstructed view of defendant as defendant drove by with his windows open at no more than 20 miles per hour; and that, from 30 feet or slightly more away, Schuldt could tell that the shoulder part of defendant's seat belt mechanism was not engaged as required by law. Schuldt would not have had to look down, much less through the car, to make his observation; if properly engaged, the shoulder strap would

have been visible at eye level and would not have been difficult to see. Conversely, its absence (or improper positioning) would be evident.

¶ 19 Taking the trial testimony insofar as it supports the trial court's ruling (see *Brooks*, 187 Ill. 2d at 127-29), we have no more difficulty with the trial court's decision. Schuldt testified that he was only 20 to 25 feet away from defendant when he saw the violation; even accepting his testimony that the time was 10:30 p.m., the trial court could have credited his testimony that the area, which was adjacent to a parking lot in an apartment complex, was well illuminated by both street lights, including one directly over defendant's car, and outside building lights. Schuldt's testimony did not offend the laws of nature.

¶ 20 Defendant cites little authority addressing a situation such as the one here. Aside from *Coulson*, which involves wholly different facts (*Coulson*, 13 Ill. 2d at 297-98), defendant cites only *dicta* from one opinion doubting a police officer's testimony that he could read a vehicle's license plate by moonlight reflected off the snow. *People v. Crowder*, 99 Ill. App. 3d 500, 502, 505 (1981). Here, under either the testimony at the suppression hearing or the trial testimony, the lighting was far superior to reflected moonlight, and it is inherently easier to notice the absence of an engaged shoulder harness than to read accurately all the digits on a license plate. Therefore, we hold that the trial court did not err in denying defendant's motion to quash arrest and suppress evidence.

¶ 21 Defendant argues second that his trial counsel was ineffective for failing to renew his motion or file a posttrial motion contending that the trial court erred in denying his motion to quash arrest and suppress evidence. Defendant reasons that there was no objective reason to forgo renewing the motion or filing a posttrial motion. He asserts that he suffered prejudice from his trial counsel's

lapse, because it was the allegedly improper traffic stop that led to the discovery of the contraband on which defendant's conviction was based. For the following reasons, we disagree.

¶ 22 To succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) counsel's performance was objectively unreasonable; and (2) it is reasonably probable that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984); *People v. Evans*, 369 Ill. App. 3d 366, 383 (2006). Because defendant must satisfy both prongs of the *Strickland* test, we may reject a claim of ineffective assistance without reaching the performance prong if we conclude that defendant has not satisfied the prejudice prong. See *People v. Graham*, 206 Ill. 2d 465, 476 (2003).

¶ 23 We cannot say that it is reasonably probable that, had defendant preserved the suppression issue, the result of the proceeding would have been different. Defendant himself does not explain why the trial court probably would have ruled differently. We can see only plausible speculation that the result of the proceeding *might* have been different. As noted, the trial court's decision had a sufficient basis in the evidence at the suppression hearing, even disregarding the trial evidence. There is no reason to believe that, after the trial, the court would have repudiated its earlier assessment of the evidence.

¶ 24 To be sure, preserving the suppression issue would have enabled defendant to argue that, in view of the trial testimony, the original ruling was no longer correct. See *Brooks*, 187 Ill. 2d at 127-28. And, we note, Schuldt's trial testimony could be seen as undermining his testimony at the suppression hearing, given the noticeable inconsistencies. In his trial testimony, Schuldt moved the encounter about three hours back, added considerable detail about the lighting in the area, and reduced the distance from which he originally observed the traffic offense by approximately 10 feet,

from a minimum of 30 feet to a minimum of 20 feet (and a maximum of 25 feet, which was less than the original minimum). But, while it is *conceivable* that the inconsistencies would have caused the trial court to change its estimate of Schuldt's credibility, we cannot say that it is *reasonably probable* that this shift would have occurred. We are especially reluctant to reach this conclusion given that defendant himself does not so argue. We hold that defendant has not established that his trial counsel was ineffective.

¶ 25 Having rejected both of defendant's claims of error, we affirm the judgment of the circuit court of Kane County.

¶ 26 Affirmed.